UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1994/2
5 April 1994

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of
Discrimination and Protection
of Minorities

Item 15 of the provisional agenda

# DISCRIMINATION AGAINST INDIGENOUS PEOPLES

## Technical review of the United Nations draft declaration on the rights of indigenous peoples

Note by the secretariat

## Introduction

1. In its resolution 1992/33 of 27 August 1992, the Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted Ms. Erica-Irene Daes, Chairperson-Rapporteur of the Working Group on Indigenous Populations, with the task of elaborating the paragraphs of the draft declaration on the rights of indigenous peoples agreed upon by members of the Working Group at its tenth session. The General Assembly, in its resolution 47/75 of 14 December 1992, the Commission on Human Rights, in its resolution 1993/30 of 5 March 1993 and the World Conference on Human Rights, in the Vienna Declaration and Programme of Action, requested the Working Group to make its best efforts to complete the elaboration of the draft declaration at its eleventh session. The Working Group on Indigenous Populations, following these recommendations, completed the drafting of a declaration on the rights of indigenous peoples at its eleventh session (E/CN.4/Sub.2/1993/29, annex I).

2. The Sub-Commission, in its resolution 1993/46 of 26 August 1993, requested the Secretary-General to submit the draft declaration as soon as possible to the appropriate services in the Centre for Human Rights for its technical revision.

3. In recent years, the secretariat has carried out technical reviews of several human rights instruments before their adoption by the General Assembly. These include technical reviews of the text of the draft convention on the rights of the child (E/CN.4/1989/WG.1/CRP.1/Add.1), the draft international convention on the protection of the rights of all migrant workers and their families (A/C.3/45/WG.1/WP.1/Rev.1/Add.1), and the draft declaration on the rights of persons belonging to national or ethnic, religious or linguistic minorities (E/CN.4/1991/WG.5/CRP.1).

4. These reviews have been guided by General Assembly resolution 41/120 of 4 December 1986, entitled "Setting international standards in the field of human rights", in which the Assembly urged drafting bodies to give due consideration to the established international legal framework (para. 2) and invited these bodies to bear in mind certain guidelines so that the instruments in question would, inter alia,

> "(a) Be consistent with the existing body of international human rights law;
>
> (b) Be of fundamental character and derive from the inherent dignity and worth of the human person;
>
> (c) Be sufficiently precise to give rise to identifiable and practicable rights and obligations;
>
> (d) Provide, where appropriate, realistic and effective implementation machinery, including reporting systems; and
>
> (e) Attract broad international support." (para. 4)

5. Sub-Commission resolution 1993/46 contains no specific suggestions as to the form the technical revision of the draft declaration should take. The technical revision contained in the present document is therefore guided by the General Assembly 41/120 and the previous experience of the secretariat in this area. In particular, attention has been given to the consistency and accuracy of the language, including assuring its gender neutrality, harmonization of the official language versions, correspondence of the preambular and operative paragraphs of the draft declaration and a consideration of the articles in the light of existing instruments. 1/ It may also be noted that the draft declaration also identifies new rights in response to the particular situations of indigenous peoples.

6. Finally, it should be observed that the revision requested by the Sub-Commission is technical in nature and is provided in order to assist indigenous peoples and Governments in understanding certain points of the draft declaration. No change has been made to the draft declaration as it was agreed upon by members of the Working Group on Indigenous Populations at its eleventh session and as contained in document E/CN.4/Sub.2/1993/29, annex 1.

## I. GENERAL COMMENTS

7. The Languages Service of the United Nations Office at Geneva was requested to examine the official language versions of the draft declaration in order to ensure harmonization of the texts. This review has been completed. It may be noted that a number of strictly linguistic changes have been made in the translations as a result of the review. In the Chinese version of the draft declaration the term "indigenous peoples" is translated as "tuzhu renmin" which means literally native peoples or natives.

Comments on the preambular paragraphs

8. The draft declaration contains 19 preambular paragraphs. These appear to be consistent with the operative part of the draft declaration. However, in the thirteenth preambular paragraph, the word "constructive" between the words "other" and "arrangements" might be added to ensure consistency with draft article 36.

Definition of terms

9. A number of issues of a general nature have been brought up at sessions of the Working Group on Indigenous Populations. These include questions relating to the definition of the beneficiaries, the scope and meaning of terms and words such as "peoples", "self-determination", "self-government and autonomy", "lands and territories" and "ethnocide and cultural genocide", and the references to collective and individual rights.

10. It may be noted that the United Nations has adopted no official definition of indigenous peoples. The Special Rapporteur of the Sub-Commission, José Martinez Cobo, in his Study of the Problem of Discrimination against Indigenous Populations writes:

> "379. Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.
>
> "380. This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:
>
> (a) Occupation of ancestral lands, or at least of part of them;
>
> (b) Common ancestry with the original occupants of these lands;

(c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);

(d) Language (whether used as the only language, as mother tongue, as the habitual means of communication at home or in the family, or as the main, preferred or habitual, general or normal language);

(e) Residence in certain parts of the country, or in certain regions of the world;

(f) Other relevant factors." (E/CN.4/Sub.2/1986/7/Add.4).

11. These considerations of the Special Rapporteur have served, inter alia, as a guide to the Working Group on Indigenous Populations. However, in the interests of flexibility and the openness of its proceedings no formal definition has been prepared by the Working Group.

12. Note may also be taken of the definition contained in article 1 of International Labour Organisation (ILO) Convention No. 169 which specifies the beneficiaries:

"1. This Convention applies to:

(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or in part by their own customs or traditions or by special laws or regulations;

(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural or political institutions.

"2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

"3. The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."

13. Furthermore, it may be noted that the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities contains no definition of the beneficiaries.

14. In relation to the terms "peoples", "self-determination" and "territories" used in the draft declaration, attention is drawn to the explanatory note concerning the draft declaration on the rights of indigenous peoples prepared by the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes (E/CN.4/Sub.2/1993/26/Add.1), which provides information on the scope of these terms in the draft declaration.

15. The draft declaration introduces the concepts of cultural genocide and ethnocide (see art. 7) and the comment of the Chairperson-Rapporteur of the Working Group on the distinction between the two terms may be borne in mind. She stated at the eleventh session of the Working Group that "cultural genocide" referred to the destruction of the physical aspects of a culture, while "ethnocide" referred to the elimination of an entire "ethnos" or people (E/CN.4/Sub.2/1993/29, para. 48).

16. Articles 12, 24 and 29 of the draft declaration include references to aspects of the cultural and intellectual property of indigenous peoples. It may be noted that the Special Rapporteur on the study on the protection of the cultural and intellectual property of indigenous peoples, Ms. Erica-Irene Daes, recommends that the term "cultural heritage" be adopted and her study (E/CN.4/Sub.2/1993/28) has been renamed accordingly. It may, thus, be appropriate to examine whether such a change can be made in the relevant articles of the draft declaration.

17. The draft declaration protects the collective and individual rights of indigenous peoples. In so doing it recognizes the prevalent communal lifestyle of the peoples concerned. Attention is drawn to existing instruments providing similar protection, including the African Charter on Human and Peoples' Rights and ILO Convention No. 169.

18. It is not appropriate in a technical revision to make comments on particular terms used in the draft declaration which go beyond those already expressed by experts of the Working Group on Indigenous Populations, except to note that certain terms, although widely used in international law, are not strictly defined. These concepts are in a continual process of evolution and refinement.

Order of articles

19. The Chairperson-Rapporteur of the Working Group on Indigenous Populations, in revising the draft declaration prior to the eleventh session of the Working Group, made a number of changes in the order of the articles. Subsequent amendments and additions to the draft declaration were made during the eleventh session of the Working Group by her and other members. It may, therefore, be useful to consider whether certain modifications in the order of the articles should be made to the text as it now stands. In particular, it may be appropriate to incorporate article 43 dealing with gender equality in article 2; and to move article 18 dealing with the protection of indigenous labour to Part V of the draft declaration, which covers social and economic rights.

20. It may also be helpful, in view of the length of the draft declaration, to consider giving summary titles to each of its parts in order to assist the reader. Suggestions for possible titles of the parts are given in the present technical revision.

Implementation

21. The General Assembly, in its resolution 41/120, emphasized that new instruments, where appropriate, should include realistic and effective implementation machinery, including reporting systems. It also stipulated that priority should be given to the implementation of existing international standards in the field of human rights.

22. In this connection, attention is drawn to the fourteenth and seventeenth preambular paragraphs. In particular, the sixteenth preambular paragraph makes reference to the Charter of the United Nations and the two International Covenants on human rights; and the eighteenth preambular paragraph recognizes the draft declaration as a "further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples".

23. In Part VIII measures to be undertaken by States and the United Nations system for the promotion of the provisions of the draft declaration are identified. In article 37, States are asked to take effective and appropriate measures, in consultation with the peoples concerned, to give full effect to the provisions of the draft declaration. Articles 38, 40 and 41 indicate measures to be taken by the United Nations system. In addition, it will be observed that the phrase "States shall take effective measures" appears in articles 13 to 17, 28, 35 and 37. It is understood that the purpose of including the phrase in specific provisions is to give guidance to States on the kind of measures they should take to protect and promote the right being provided for in an article.

## II. COMMENTS ON THE DRAFT ARTICLES

PART I (general principles)

Article 1

24. The draft declaration is not the first human rights instrument that attributes human rights not only to the individual but also to a group or a people. Other instruments that do so are the International Convention on the Elimination of All Forms of Racial Discrimination, the African Charter on Human and Peoples' Rights (arts. 19-24) and ILO Convention No. 169, which states in article 3, paragraph 1, that "Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance and discrimination".

25. Moreover, some of the rights contained in ILO Convention No. 169 explicitly apply to peoples. For example, in article 7, paragraph 1, the Convention states that "The peoples concerned shall have the right to decide their own priorities for the process of development". In the same Convention it is provided that: "These peoples shall have the right to retain their own

customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights" (art. 8, para. 2) and "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised" (art. 14, para. 1).

Article 2

26. The principle of non-discrimination between individuals is a central norm of human rights law and is to be found, inter alia, in the Charter of the United Nations, the Universal Declaration of Human Rights (arts. 2 and 7), the International Covenant on Civil and Political Rights (art. 2, para. 1) and the International Covenant on Economic, Social and Cultural Rights (art. 2, para. 2) and the United Nations Declaration and International Convention on the Elimination of All Forms of Racial Discrimination (arts. 1 and 2, respectively).

27. The Declaration on Race and Racial Prejudice, adopted by the United Nations Educational, Scientific and Cultural Organization on 27 November 1978, extends this principle to groups: "The State has prime responsibility for ensuring human rights and fundamental freedoms on an entirely equal footing in dignity and rights for all individuals and all groups" (art. 6, para. 1).

28. The above-mentioned International Convention on the Elimination of All Forms of Racial Discrimination makes comparable references to groups. Its article 2, paragraph 1 (a) states that "Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions" and paragraph 2 of the same article declares that "States Parties shall ... take ... measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms ...". Similar references to protection of groups from racial discrimination may be found in articles 4 (a) and 14 of the Convention.

29. The Sub-Commission may wish to consider whether article 43 of the present draft declaration guaranteeing rights equally to male and female indigenous individuals would not be more appropriately placed in Part I dealing with general principles. In which case, consideration might be given to including the text of the article at the end of article 2. It may be noted that ILO Convention No. 169 includes such a provision in its article 3 dealing with non-discrimination.

Article 3

30. The text of this article is precisely based on article 1, paragraph 1, of the two International Covenants.

Article 4

31. The Sub-Commission may wish to consider whether there is some overlap between article 4 and articles 8, 21 and 33. For example, article 4 states

that "Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems,"; article 8 states that "Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such." Article 21 of the draft provides that "Indigenous peoples have the right to maintain and develop their political, economic and social systems". Article 33 also recognizes the right of indigenous peoples "to promote, develop and maintain ... their distinctive juridical customs, traditions, procedures and practices".

32. It may be argued that the idea that distinct groups have the right to maintain their characteristics is already present in article 27 of the International Covenant on Civil and Political Rights, which gives persons belonging to ethnic, religious or linguistic minorities the right to enjoy their own culture, practise their religion and use their language "in community with the other members of their group". Article 30 of the Convention on the Rights of the Child reaffirms these rights with specific reference to indigenous children. The recently-adopted Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities also promotes such group rights.

Article 5

33. The right to a nationality is enshrined in article 15 of the Universal Declaration of Human Rights. Article 24, paragraph 3 of the International Covenant on Civil and Political Rights and article 7 of the Convention on the Rights of the Child give every child the right to acquire a nationality.

PART II (life, integrity and security)

Article 6

34. In article II of the Convention on the Prevention and Punishment of the Crime of Genocide, genocide is described as, inter alia, "forcibly transferring children of the group to another group" with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The draft declaration reaffirms the importance of the right to guarantees against genocide for indigenous peoples.

35. The article also evokes article 3 of the Universal Declaration of Human Rights, which states that "Everyone has the right to life, liberty and security of person". The right to life is also enshrined in the two international human rights covenants and regional human rights treaties. The Sub-Commission may wish to use the word "right" in the singular in accordance with the above-mentioned article of the Universal Declaration.

Article 7

36. The right not to be subjected to ethnocide or cultural genocide, although the subject of debate at the time of negotiation of the Convention on the Prevention and Punishment of the Crime of Genocide, is not contained in any existing international human rights instruments. 2/ However, the incidence

of ethnocide or cultural genocide may fall within the scope of the International Covenant on Civil and Political Rights (art. 27). 3/ Furthermore, reference may be made to the meeting on ethnocide and ethnodevelopment held in Costa Rica in 1981 under the auspices of UNESCO. At that meeting ethnocide was defined as the condition under which an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language. 4/

Article 8

37. See comment under article 4.

Article 9

38. Article 32 deals with the right of indigenous peoples to determine their own citizenship and membership of their institutions. Since the two articles are closely related, the Sub-Commission may wish to consider whether their consolidation is desirable.

Article 10

39. Reference is made to article 17 of the Universal Declaration of Human Rights, which states: "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property."

40. The Sub-Commission may wish to consider the language used in articles 25, 26 and 27 of the draft declaration. These articles speak of "lands and territories which they have traditionally owned or otherwise occupied or used". Article 10 speaks only of "their lands and territories" without giving any specification. A similar provision is contained in article 16 of ILO Convention No. 169, which refers to "the lands which they occupy".

41. It appears that article 10 as currently drafted is open to interpretation. It is not clear whether the provision only applies to lands and territories for which indigenous peoples have obtained a legal title or whether it applies to lands and territories which have traditionally been owned, occupied or used by them. It might therefore be considered whether the same formulation as contained in articles 25 to 27 (or as in art. 16 of ILO Convention No. 169) should be used in article 10.

42. With regard to the compensation which has to be given in the case of relocation, article 16 of ILO Convention No. 169 is more detailed. It states that "peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development", but also leaves open the option for compensation in money if the peoples concerned so prefer.

43. Similarly, article 27 of the draft declaration, which deals with the restitution of or compensation for lands which have been confiscated without the free and informed consent of the indigenous peoples concerned, explicitly

states that compensation "shall take the form of lands, territories and resources, equal in quality, size and legal status", but also allows for other agreements as long as they are freely entered into. It might be considered whether a more detailed provision following the lines of article 16 of ILO Convention No. 169 or article 27 of the draft declaration would be appropriate in article 10. Alternatively, consideration might be given to placing article 10 within Part VI, dealing with land, possibly by incorporating it in article 27.

44. A further consideration relates to the practise of what is known as "sedentarization", namely the forced settlement of nomadic and semi-nomadic peoples. It may be asked whether the reference in article 10 to relocation of peoples also encompasses those who might be settled on lands and denied their right to pursue their traditional nomadic way of life.

Article 11

45. In article 11, reference is made only to the Fourth Geneva Convention (Geneva Convention relative to the Protection of Civilian Persons in Time of War). The two Additional Protocols to the Geneva Conventions also contain provisions for the protection of civilian populations. Therefore it might be considered useful to include a reference to these instruments in this article. A different approach, taken in article 38 of the Convention on the Rights of the Child, would be to refer to "the obligations under international humanitarian law to protect the civilian population in armed conflicts".

46. Subparagraph (a) prohibits the recruitment of indigenous individuals against their will into the armed forces, in particular, for use against other indigenous peoples. It is not clear how this prohibition relates to the right to a nationality (art. 5), which in many countries includes the duty to serve in the armed forces. Although note may also be taken of national initiatives to exempt indigenous people from civil or military service. 5/

47. Subparagraph (b) prohibits the recruitment of indigenous children into the armed forces under any circumstances. If the term "children" is used in the draft declaration as defined in article 1 of the Convention on the Rights of the Child (i.e. every human being below the age of 18), the provision goes beyond the Convention. Article 38, paragraph 3 of the Convention on the Rights of the Child prohibits the recruitment of "any person who has not attained the age of 15 years". For the recruitment of persons over 15 but under 18 it only states that "States shall endeavour to give priority to those who are oldest". However, it may be noted that a new proposal by the Committee on the Rights of the Child is to amend the above-mentioned provision of the Convention with a view to prohibiting the recruitment of any persons who have not attained the age of 18 (see Report of the Committee on the Rights of the Child on its third session, 11-28 January 1993, document CRC/C/16/Annex 7).

PART III (culture, religious and linguistic identity)

48. The right of persons belonging to ethnic, religious or linguistic minorities "in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own

language" is protected in article 27 of the International Covenant on Civil and Political Rights. Part III of the draft declaration extends these rights to indigenous peoples. It may be noted that article 30 of the Convention on the Rights of the Child gives the same rights to children belonging to such minorities but also refers explicitly to children who are "indigenous". It may also be noted that the individual's scientific, literary or artistic production is protected in article 15, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights.

Article 12

49. In this article the right of indigenous peoples to practise and revitalize their cultural traditions and customs includes "the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs".

50. It may be noted that article 24 of the draft declaration, which is placed in Part V covering social and economic rights, deals with intellectual property in the specific context of traditional medical knowledge and gives indigenous peoples the "right to the protection of vital medicinal plants, animals and minerals". Article 29, which is placed in Part VI dealing with land and resources, also protects the cultural and intellectual property of indigenous peoples, but has a broader scope as it refers to "sciences, technologies and cultural manifestations, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs and visual and performing arts".

51. The Sub-Commission may wish to consider whether it is appropriate to bring together all aspects of the cultural and intellectual property of indigenous peoples - what the Special Rapporteur on the protection of the cultural property of indigenous peoples, Ms. Erica-Irene Daes, calls the heritage of indigenous peoples (see E/CN.4/Sub.2/1993/28) - in Part III, possibly under one article.

Article 13

52. Article 18 of the Universal Declaration of Human Rights contains the right of everyone to freedom of thought, conscience and religion, which includes freedom "either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".

53. Article 18, paragraph 1 of the International Covenant on Civil and Political Rights uses almost the same wording. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief in article 1 also protects this right. However, it should be noted that both instruments allow certain limitations on the right to manifest one's religion or belief if these limitations "are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others".

Article 14

54. The second part of this article calls on States to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings. A similar provision - although only applying to criminal proceedings - is already contained in article 14, paragraph 3 (f) of the International Covenant on Civil and Political Rights, which gives a person charged with a criminal offence the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

55. Article 12 of ILO Convention No. 169 also obliges States "to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means".

PART IV (education and public information)

Article 15

56. The article contains two main ideas: firstly that indigenous children have the right to all levels and forms of education of the State, and secondly that indigenous peoples have the right to set up their own educational systems. Both rights are already well established in other international instruments.

57. The right to education is contained in article 26 of the Universal Declaration of Human Rights and in article 13 of the International Covenant on Economic, Social and Cultural Rights. Moreover, paragraphs 3 and 4 of article 13 of the Covenant recognize the right of private entities to establish educational institutions, and the right of parents to send their children to such institutions provided that these institutions conform to such minimum educational standards as may be laid down by the State. Similarly article 28, paragraph 1, of the Covenant on the Rights of the Child recognizes the right of the child to education and article 29, paragraph 2, guarantees the right of private entities to establish educational institutions, which is again subject to the condition that they conform to such minimum standards as may be laid down by the State.

58. Article 26 of ILO Convention No. 169 obliges States "to ensure that members of the peoples concerned [indigenous and tribal peoples] have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community"; article 27, paragraph 3, states that

> "governments shall recognize the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples".

59. The Sub-Commission may wish to consider whether the article might be further elaborated to include an idea contained in article 28, paragraph 1, of ILO Convention No. 169, which states that indigenous children "shall, wherever practicable, be taught to read and write in their own indigenous language or

in the language most commonly used by the group to which they belong". A similar right relating to minorities is contained in article 4, paragraph 3, of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which provides that "States should take appropriate measures so that, wherever possible, persons belonging to minorities have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue".

Article 16

60. The principle that one of the objectives of education is to promote understanding and tolerance among "all racial, ethnic or religious groups" is contained in article 13, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights. Article 29, paragraph 1 (d), of the Convention on the Rights of the Child states that education shall be directed to the "preparation of the child for responsible life in a free society, in the spirit of understanding ... and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin".

61. Article 31 of ILO Convention No. 169, with a view to eliminating prejudice against indigenous peoples, states that "efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples". With regard to minorities, a similar right is provided in article 4, paragraph 4, of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities which calls on States to "take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory".

Article 17

62. The article deals with three issues: the right of indigenous peoples to establish their own media; to have access to all forms of non-indigenous media; and to have indigenous cultural diversity reflected in State-owned media.

63. Similar rights pertaining to children are contained in article 17 of the Convention on the Rights of the Child. In the article the importance of the mass media is recognized and States are requested to encourage the media to disseminate information beneficial to children and in accordance with the spirit of article 29 of that Convention. As article 29 deals, inter alia, with the promotion of respect for the child's cultural identity, language and values and the promotion of understanding and friendship among different groups of society including persons of indigenous origin, the intention is similar to the idea contained in article 17 of the draft declaration.

Article 18

64. The rights contained in this article (the right of indigenous peoples to enjoy all rights established by national and international labour law and the

right of indigenous individuals not to be subjected to any discriminatory conditions of labour, employment or salary) are already well established in other international standards.

65. Article 23 of the Universal Declaration of Human Rights contains basic standards which assure everyone's "right to work, to just and favourable conditions of work and to protection against unemployment", as well as "the right to equal pay for equal work". The same rights are also contained in article 7 of the International Covenant on Economic, Social and Cultural Rights.

66. Article 20, paragraph 1, of ILO Convention No. 169 elaborates the right further and obligates Governments to take positive action on behalf of indigenous peoples. Thus, the article states that Governments shall, in cooperation with the peoples concerned,

> "adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general".

Paragraph 2 of the same article goes into more detail. It calls on Governments to "do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers" and enumerates a number of areas to which particular attention shall be paid, such as admission to employment, equal remuneration for equal work, occupational health and safety, and social security. Paragraph 3 of the same article provides protection from sexual harassment.

67. The Sub-Commission may consider that the text of the article is satisfactory given the extensive international standards existing, in particular the relevant Conventions of the ILO. However, consideration may be given to placing the article within Part V, dealing with economic and social rights.

PART V (economic and social rights)

Article 19

68. The article gives indigenous peoples the right to participate in decision-making through representatives chosen by them and the right to maintain and develop their own decision-making institutions.

69. As far as the right to participate in decision-making is concerned, a similar idea - although placed in the context of elections - is contained in article 21, paragraph 1, of the Universal Declaration, which states that "everyone has the right to take part in the government of his country, directly or through freely chosen representatives", and in article 25 (a) of the International Covenant on Civil and Political Rights, which gives everyone the right to "take part in the conduct of public affairs, directly or through freely chosen representatives".

70. Article 2, paragraph 2, of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities gives such persons the "right to participate effectively in cultural, religious, social, economic and public life"; article 2, paragraph 3, gives them the "right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation".

71. Article 6, paragraph 1 (b), of ILO Convention No. 169 calls on Governments to:

> "establish means by which these peoples [indigenous and tribal peoples] can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them".

72. With regard to the right to maintain and develop their own indigenous decision-making institutions, a similar idea is contained in article 6, paragraph 1 (c), of ILO Convention No. 169, which states that Governments shall "establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose".

Article 20

73. The article deals with a particular aspect of participation in decision-making, namely the right of indigenous peoples to participate in elaborating legislative or administrative measures that may affect them.

74. Again, a similar right is already contained in ILO Convention No. 169, in article 6, paragraph 1 (a), whereby indigenous peoples have the right to be consulted "through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly".

Article 21

75. As far as the article deals with the right of indigenous peoples to maintain and develop their political, economic and social systems, see the comment under article 4.

76. A further point may be added to the comment under article 4. Article 1, paragraph 1, of the Declaration on Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, reaffirms the right of minorities to protect and promote their identity and article 4, paragraph 2, of the same Declaration calls for States to "take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards". Article 2 of ILO Convention No. 169 extends this right to indigenous peoples. Paragraph 1 states that Governments shall

protect the rights of these peoples and guarantee respect for their integrity. Paragraph 2 lists a number of measures to achieve this end, inter alia, "promoting the full realization of the social, economic, and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions".

77. Article 21 also sets out the right of indigenous peoples to be secure in the enjoyment of their own means of subsistence and development and to engage in all their traditional and other economic activities. Reference can be made to article 25 of the Universal Declaration of Human Rights and article 11 of the International Covenant on Economic, Social and Cultural Rights, which recognize the right of everyone to an adequate standard of living. A similar right is contained in article 27 of the Convention on the Rights of the Child with particular regard to children.

78. A more specific provision is contained in article 23 of ILO Convention No. 169 which states in paragraph 1 that "handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development". Governments are called upon, with the participation of the peoples concerned, to strengthen and promote these activities. Paragraph 2 deals with technical and financial assistance, which shall take into account "traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development".

79. The last sentence of article 21 of the draft declaration gives "indigenous peoples who have been deprived of their means of subsistence and development" the right to "just and fair compensation". The Sub-Commission may wish to consider whether it is necessary to elaborate further this part of the article.

Article 22

80. Apart from provisions that give everyone the right to an adequate standard of living (see comment under art. 21), ILO Convention No. 169 contains a number of provisions concerning the improvement of the economic and social conditions in which indigenous peoples live. Article 2, paragraph 2 (c), calls on Governments to take measures for "assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life". A similar aim is set out in article 7, paragraph 2, which states that "the improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and cooperation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement".

81. A number of specific aspects of economic and social conditions mentioned in article 22 of the draft declaration are also explicitly dealt

with in ILO Convention No. 169: article 20 deals with employment; article 21 with vocational training; article 24 with social security; and article 25 with health services.

Article 23

82. Article 7, paragraph 1, of ILO Convention No. 169 contains a similar provision. It states that "the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use and to exercise control, to the extent possible, over their own economic, social and cultural development".

83. Article 23 of the draft declaration reflects the provision contained in ILO Convention No. 169, in that it states that "indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions".

Article 24

84. The article deals with the right of indigenous peoples to their traditional medicines and health practices, as well as their right to have access to other health services and medical care.

85. The right of everyone to "the highest attainable standard of physical and mental health" is contained in article 12, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights. Among the steps listed in paragraph 2 of that article, to be taken by States Parties to the Covenant, is the "creation of conditions which would assure to all medical service and medical attention in the event of sickness". Article 25 of ILO Convention No. 169 deals with the provision of health services for indigenous peoples. Paragraph 1 of that article states that "Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health".

86. As far as the right to the protection of vital medicinal plants, animals and minerals is concerned, see the comment made under article 12.

PART VI (land and resources)

87. Articles 25 to 27 use differing terms for lands and territories of indigenous peoples. Article 25 speaks about "the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used". Article 26 refers to "lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used". Article 27 uses the phrase "the lands, territories and resources which they have traditionally owned or otherwise occupied or used". Note may also be taken of the more limited definition of

the term "lands" contained in chapter 26 of Agenda 21 of the Final Report of the United Nations Conference on Environment and Development, in which the term "lands" is understood "to include the environment of the areas which the peoples traditionally occupy".

88. The Sub-Commission may consider it helpful to define the lands and territories in question in article 25, as is done in article 26, and thereafter use the phrase "lands and territories" without further qualification.

Article 25

89. A comparable recognition of the spiritual relationship of indigenous peoples to their lands and territories is contained in article 13 of ILO Convention No. 169.

Article 26

90. A similar provision is contained in article 14, paragraph 1, of ILO Convention No. 169, which states that "the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized". It may be noted, however, that article 14 of the ILO Convention asks Governments "to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities". The article makes specific reference to nomadic peoples and shifting cultivators. The Sub-Commission may wish to consider whether such a reference would be useful in article 26 of the draft declaration.

91. Moreover, article 14 of ILO Convention No. 169 asks Governments to establish adequate procedures within the national legal system to deal with land claims of indigenous peoples, while the draft declaration does not cover any procedural aspects of indigenous peoples' land rights.

Article 27

92. A provision covering some of the elements of this article is contained in article 16 of ILO Convention No. 169. In article 16, paragraph 4, the ILO text refers to cases where indigenous peoples cannot return to their lands. In such cases, indigenous and tribal peoples are to be provided with "lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees".

93. The Sub-Commission may wish to consider whether these additional possibilities improve the protection offered to indigenous peoples.

Article 28

94. A similar though less specific provision is contained in article 7, paragraph 4, of ILO Convention No. 169 which asks Governments to "take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit".

95. Attention is drawn to chapter 26 of Agenda 21 of the United Nations Conference on Environment and Development in which a series of relevant recommendations are listed, in particular, that "the lands of indigenous people and their communities should be protected from activities that are environmentally unsound" (A/CONF.151/26 (Vol. III)).

96. In the last paragraph of the article, there is ambiguity about whether States or indigenous peoples are responsible for the implementation of health programmes. The Sub-Commission may wish to consider redrafting the last paragraph as follows:

> "States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed in consultation with the peoples affected by such hazardous materials, are duly implemented".

Article 29 (protection of cultural and intellectual property)

97. See comments made under article 12 and the study prepared by the Special Rapporteur (E/CN.4/Sub.2/1993/28). Note may also be taken of article 8 (j) of the Convention on Biological Diversity, which states that the Contracting Party shall:

> "Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices".

Article 30 (right to determine priorities for development)

98. This article gives indigenous peoples the "right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources". The article reflects the spirit of articles 1 and 2 of the Declaration on the Right to Development, which proclaims the right of all peoples to "participate in, contribute to, and enjoy economic, social, cultural and political development" (art. 1.1) and declares that "all human beings have a responsibility for development, individually and collectively" (art. 2.2).

99. A similar right is contained in article 7 of ILO Convention No. 169, which also gives indigenous peoples the right "to decide their own priorities for the process of development". In paragraph 3 of the same article of the

ILO Convention, Governments are asked to ensure that studies are carried out, in cooperation with indigenous peoples, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. Article 15, paragraph 2, of ILO Convention No. 169 requires that Governments shall establish or maintain procedures for consultation with indigenous peoples prior to undertaking or permitting the exploitation of resources on their lands.

100. The Sub-Commission may wish to consider whether the kinds of studies or procedures undertaken prior to any development on indigenous peoples' lands referred to in the ILO Convention might be included in the draft declaration.

101. It may be of interest to note the World Bank's Operational Directive (No. 4.20) of September 1991 (contained in document E/CN.4/Sub.2/AC.4/1992/2). This states, inter alia, that "The key step in project design is the preparation of a culturally appropriate development plan based on full consideration of the options preferred by the indigenous people affected by the project".

PART VII (indigenous institutions)

Article 31

102. The article is based in part on the recommendations of the United Nations Expert Meeting to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples, held at Nuuk, Greenland, in September 1992 (E/CN.4/1992/42, recommendation 12).

Article 32

103. In article 5 of the draft declaration, it is stated that "Every indigenous individual has the right to a nationality". It may be questioned whether this right is different from the right, contained in this article, of "indigenous individuals to obtain citizenship of the States in which they live". To harmonize the article with article 5, the Sub-Commission may wish to consider replacing the words "obtain citizenship" with the words "become nationals".

Article 33

104. Reference is made to article 6, paragraph 1 (c), of ILO Convention No. 169 which calls on Governments to "establish means for the full development of these peoples' own institutions and initiatives". Note may also be taken of articles 8 to 12 of that Convention, which deal with legal matters. Article 8 of the Convention states that indigenous peoples "shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights"; and article 9, paragraph 1, states that subject to the same limitations "the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected".

Article 34

105. Article 29, paragraph 1, of the Universal Declaration of Human Rights states that "Everyone has duties to the community in which alone the free and full development of his personality is possible". It may be noted that in her Study on the Freedom of the Individual under Law: a Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under article 29 of the Universal Declaration of Human Rights, the Special Rapporteur, Ms. Erica-Irene Daes, makes a relevant point. She writes:

> "It was said that the purpose of paragraph 1 of the article was to make plain the interdependence of the rights and duties which linked an individual with the community. In choosing the word 'community', the intention had been to point out, quite rightly, that the State was not the only social group concerned. If an individual had natural and inalienable rights transcending any specific legislation, he also had duties towards the community, independent of the characteristics of any given community." (United Nations publication, Sales No. E.89.XIV.5, p. 29.)

106. A limitation on the exercise of these duties is contained in article 30 of the Universal Declaration of Human Rights and in article 45 of the draft declaration.

Article 35

107. Article 32 of ILO Convention No. 169 states that "Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and cooperation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields".

108. Attention is also drawn to the Declaration of the Principles of International Cultural Cooperation, proclaimed by the United Nations Educational, Scientific and Cultural Organization, whose article V states that "cultural cooperation is a right and a duty for all peoples and all nations, which should share with one another their knowledge and skills".

Article 36

109. Attention is drawn to the ongoing study on treaties, agreements and other constructive arrangements between States and indigenous peoples by the Special Rapporteur, Mr. Miguel Alfonso Martínez (see first progress report, E/CN.4/Sub.2/1992/32), whose eventual conclusions and recommendations may have some bearing on this article.

110. The Sub-Commission may wish to move the phrase "or their successors" so that it no longer follows "constructive arrangements concluded with States" and place it after "and to have States". This might give a clearer meaning to the article.

PART VIII (implementation)

Article 37

111. Note may be taken of article 7 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, in which it is stated that the rights and freedoms of that Declaration "shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice".

Article 38

112. It may be noted that the article reflects in spirit the Declaration on the Right to Development, in particular the fifth preambular paragraph, which recalls "the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples", and article 3, which declares that "States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development".

Article 39

113. Reference is made to article 16 of the International Convention on the Elimination of All Forms of Racial Discrimination which provides for procedures for settling disputes. The Universal Declaration of Human Rights, in its article 8, invokes the right of everyone to an effective remedy by the competent national tribunals for acts violating fundamental rights.

Article 40

114. A similar exhortation is contained in article 9 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

Article 41

115. Attention is drawn to General Assembly resolution 48/163, paragraph 20, and Commission on Human Rights resolution 1994/28 of 4 March 1994, which give priority to the establishment of a permanent forum for indigenous people.

PART IX (general provisions)

Article 42

116. A provision which might be considered comparable is contained in article 23 of the Convention on the Elimination of All Forms of Discrimination against Women, which states that "Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women".

Article 43

117. Articles aimed at the prevention of discrimination against women and the equal guarantee of human rights to women can be found in article 2 of the Universal Declaration of Human Rights, article 2 of both the International Covenants, and in the Declaration and the Convention on the Elimination of All Forms of Discrimination against Women. Attention is also drawn to article 3 of both the Covenants which reads:

> "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights [civil and political rights] set forth in the present Covenant".

118. See also the comment under article 2.

Article 44

119. A similar provision exists in article 35 of ILO Convention No. 169. However, in that article no reference is made to possible future rights.

Article 45

120. The wording of this article is similar to article 30 of the Universal Declaration of Human Rights, as well as article 5, paragraph 1, of both the International Covenants.

Notes

1/ In the preparation of this technical review the following international instruments were considered: the international instruments contained in Human Rights: A Compilation of International Instruments, United Nations, New York, 1993; the African Charter on Human and Peoples' Rights, International Labour Organisation Convention No. 169, the Convention on Biological Diversity.

2/ See, for example, General Assembly document A/362 (1946).

3/ The Human Rights Committee has examined several communications from indigenous peoples, which confirms that complaints from indigenous peoples can be considered by the Committee under article 27. See Lovelace v. Canada (Communication No. 24/1977) and Kitok v. Canada (Communication No. 197/1985).

4/ Declaration of San José, UNESCO meeting of experts on ethnodevelopment and ethnocide in Latin America, San José, Costa Rica, 7-11 December 1981.

5/ Article 67 of the Constitution of Paraguay states that "members of indigenous peoples shall be exempt from social, civil and military services and from legal public obligations".

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